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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JULIO MONTES RAMIREZ, Defendant and Appellant.	G055651 (Super. Ct. No. C67360) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Cheri T. Pham, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Seeking to avoid the adverse immigration consequences of a 1988 drug conviction based on a guilty plea, appellant Julio Montes Ramirez filed a motion under Penal Code section 1473.7 to vacate the conviction due to ineffective assistance of counsel. (All further statutory references are to the Penal Code unless otherwise noted.) Ramirez contended his counsel failed to advise him the guilty plea would lead to deportation and made no attempt to negotiate an alternative, immigration-safe plea.

The trial court denied the motion to vacate on the ground Ramirez failed to demonstrate his counsel's performance was deficient or caused him any prejudice. We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Ramirez, a Mexican citizen, entered the United States in 1983 at the age of 14. The record is unclear whether he entered with proper legal documents. On February 10, 1988, the Orange County District Attorney's Office charged Ramirez and four codefendants with 10 felony counts of transporting or selling cocaine. (Health & Saf. Code, § 11352.) The complaint alleged Ramirez made four drug sales to undercover officers.

On February 26, 1988, Ramirez, represented by retained counsel Gene Dorney, pleaded guilty to the four felony counts. The court suspended imposition of sentence and placed Ramirez on formal probation for three years, conditioned on serving 90 days in jail.

On November 23, 2001, the former Immigration and Naturalization Service (INS) issued Ramirez a notice to appear, alleging he was "subject to removal from the United States" due to his drug conviction. The notice cited a provision of the Immigration and Nationality Act which provides an alien is "[i]nadmissible" if "convicted of . . . any law or regulation of a State . . . relating to a controlled

substance[.]" (8 U.S.C. § 1227, subd. (a)(1)(A), INA § 237, subd. (a)(1)(A).) On December 21, 2001, Ramirez was removed pursuant to a deportation order.

In May 2004, Ramirez reentered the United States illegally. On August 23, 2015, immigration authorities issued a reinstatement of the 2001 removal order. He is currently appealing the reinstatement order in federal court.

A. *The Motion to Vacate the Conviction*

On August 25, 2017, Ramirez moved under section 1473.7 to vacate the 1988 conviction and withdraw his guilty plea. Effective January 1, 2017, section 1473.7 allows a person no longer in custody to ask the court to vacate a conviction which "is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a)(1).) The statute requires the court to grant the motion to vacate "if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)." (§ 1473.7, subd. (e).)

Ramirez's motion to vacate argued his conviction was legally invalid because his attorney, Dorney, provided constitutionally deficient representation in recommending Ramirez plead guilty to the four felony drug charges without advising him the guilty plea would result in deportation and permanent exclusion from the United States. Ramirez asserted he would not have pleaded guilty had he known the plea carried those consequences. The motion further faulted Dorney for failing to investigate possible defenses, consult an immigration attorney on the immigration consequences of the plea, or attempt to negotiate an "immigration-safe alternative disposition."

In support, Ramirez submitted his own declaration, a declaration from his current defense counsel and immigration attorney, certain immigration orders, and records showing his wife and two young children are United States citizens. He

presented no declaration from prior defense counsel Dorney, nor any explanation for why he did not provide one.

In his own declaration, Ramirez denied having any knowledge or understanding in 1988 of the immigration consequences of his guilty plea. He stated his attorney "never told me that I could face mandatory deportation, not be able to post bail, and could be subject to arrest by immigration authorities as a result of my plea in this case. . . . [¶] My attorney never advised me there was even a possibility that [INS] would deport me as a result of my plea[.] . . . [¶] [¶] Although the court may have advised me that there were possible immigration consequences of my plea, I really did not understand."

Ramirez further asserted he would never have pleaded guilty had he known of those consequences: "I would have gone to trial or I would have plead[ed] to a different charge that would avoid my deportation. . . . I would have fought my case rather than be separated from my family." Emphasizing his concern for his family, Ramirez stated his removal based upon the conviction "would be devastating to me and my family and would cause my wife and children exceptional . . . hardship[.]"

The declaration from Ramirez's current defense counsel, who is also his immigration attorney, summarized the dire immigration consequences of a drug trafficking conviction. The attorney stated, based on his experience, an immigrant defendant would not "be willing to take an offer or plea bargain that looked attractive on the surface if he knew it meant he would never be able to live . . . with his family again in his adopted country." Counsel further stated that had he been consulted he would have recommended against pleading guilty to the drug charges "because of the terrible [immigration] consequences[.]"

The district attorney filed no written opposition to the motion, but at the hearing argued the motion was untimely and Ramirez was "ineligible" for relief under section 1473.7 because of his 2001 deportation based on the conviction. The prosecutor

also argued Ramirez failed to meet his burden of proving prejudicial error by a preponderance of the evidence, given that defense counsel did "a good job" for Ramirez in negotiating a 90-day jail sentence when the maximum term was nine years in prison.

B. *Trial Court Order Denying the Motion to Vacate*

The trial court denied the motion to vacate on the merits, expressly declining to rule on the prosection's procedural objections related to Ramirez's 2001 deportation. The court explained its reasoning in a detailed minute order.

Essentially, the court found Ramirez failed to establish his claim of ineffective assistance because he made "no showing of any failure to advise or of any other error" on the part of his attorney. The court rejected Ramirez's "self-serving" assertion his attorney never informed him of the immigration consequences of pleading guilty, finding the assertion lacked credibility in light of the *Tahl* form he initialed and signed under penalty of perjury.

The trial court noted Ramirez initialed the box on the *Tahl* form stating he had discussed with his attorney, and understood, that "if I am not a citizen of the United States the conviction for the offense charged may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." The court further noted Ramirez's attorney "also signed a statement in the plea form that he discussed everything with defendant. There is no support for the present assertion that Mr. Dorney never discussed the immigration consequences aside from defendant's belated, self-serving statements."

Likewise, the trial court rejected Ramirez's contention Dorney provided ineffective assistance by not attempting to negotiate a "lesser plea" that did not jeopardize Ramirez's immigration status. "Such an attempt in this case would have almost certainly been futile, as the People's case was strong." The court cited police reports documenting the four incidents in which undercover officers "actually observed defendant selling drugs to another officer[.]" Given such damning evidence, "there is no

reason to believe the District Attorney would have agreed to any sort of plea to a different but related offense."

Finally, the trial court ruled Ramirez "failed to demonstrate prejudice." First, the court pointed to the fact Ramirez "received a very light sentence" — "90 days in jail and probation" when "[h]is maximum exposure was nine years." Second, the court found Ramirez "submits nothing to establish that in 1988 he was concerned about his immigration status. . . . [He] provided no corroboration for his claim that he would not have accepted the proposed disposition had he been advised of the immigration consequences[.]"

On that latter point, the trial court rejected Ramirez's contention his concern for his American wife and children would have stopped him from *knowingly* pleading guilty to charges that could lead to his deportation, noting Ramirez was unmarried and childless at age 18 when he entered the plea. "In 1988, defendant had been in the country for five years. He did not marry his wife until 2006, and did not have his children until after that." In comments to defense counsel at the hearing, the court stated: "It's hard for me to be convinced that your client would have risked going to trial and get more than 90 days in jail. It looks [] as though your client was only interested in getting out of custody."

II

Discussion

A. *Preliminary Matters*

Ramirez contends the trial court erred in denying his section 1473.7 motion to vacate his conviction because he proved he received ineffective assistance of counsel in connection with his guilty plea. To prevail on his claim of ineffective assistance, Ramirez had to prove "that (1) counsel's representation fell below an objective standard of reasonableness, as judged by 'prevailing professional norms' (*Strickland* [*v. Washington* (1984)] 466 U.S. [668,] 688), and, (2) 'but for counsel's unprofessional

errors, the result of the proceeding would have been different' (*id*. at p. 694; *Padilla* [*v. Kentucky* (2010)] 559 U.S. [356,] 366 [(*Padilla*)]; that is, 'a reasonable probability exists that, but for counsel's incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial' (*In re Resendiz* [(2001)] 25 Cal.4th [230,] 253, [abrogated in part on other grounds in *Padilla, supra*, 559 U.S. at p. 370].)" (*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116-1117 (*Olvera*).)

There is a split of authority as to the correct standard of review in an appeal from the denial of a section 1473.7 motion to vacate a conviction based on ineffective assistance of counsel. The majority view adopts the de novo standard (see *People v. Ogunmowo* (2018) 23 Cal.App.5th 67 (*Ogunmowo*); *People v. Tapia* (2018) 26 Cal.App.5th 942, 950; *Olvera, supra*, 24 Cal.App.5th at p. 1116), while one case adopts the abuse of discretion standard (see *People v. Gonzalez* (2018) 27 Cal.App.5th 738, 747-748 (*Gonzalez*)). We are persuaded the majority view is correct.

Ogunmowo, supra, 23 Cal.App.5th 67 articulates the rationale for de novo review of an order denying a motion to vacate a conviction for ineffective assistance: "De novo review is the appropriate standard for a mixed question of fact and law that implicates a defendant's constitutional right. (*People v. Cromer* (2001) 24 Cal.4th 889, 899-902.) A defendant's claim that he or she was deprived of the constitutional right to effective assistance of counsel 'presents a mixed question of fact and law,' and we accordingly review such question independently. (*In re Resendiz*[, *supra*,] 25 Cal.4th [at p.] 248 [(*Resendiz*)].) We accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel's deficient performance and resulting prejudice to the defendant. ([*Id*.,] at p. 249.)" (*Ogunmowo, supra*, 23 Cal.App.5th at p. 76.)

Before proceeding to the merits, we must address the Attorney General's procedural challenge to Ramirez's motion to vacate the conviction based on lack of

"reasonable diligence" within the meaning of the statute.[1] Section 1473.7, subdivision (b), states a motion to vacate a conviction must be "filed with reasonable diligence after the *later* of the following: [¶] (1) The date the moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal. [¶] (2) The date a removal order against the moving party, based on the existence of the conviction or sentence, becomes final." (*Ibid.*, italics added.) The Attorney General asserts we should dismiss the appeal because Ramirez did not act with the requisite "reasonable diligence" in moving to vacate the conviction, citing the eight-month gap between the effective date of the statute and Ramirez's motion to vacate.

The Attorney General's lack of diligence argument ignores the fact the "removal order" relevant to this proceeding is not the order issued in 2001, 16 years before section 1473.7 gave Ramirez a procedural mechanism for challenging the underlying conviction. Rather, the relevant order is the more recent order reinstating the earlier removal order. Because Ramirez currently is appealing the reinstatement order in federal court, that order is not yet final and the period within which Ramirez must act with "reasonable diligence" in filing a section 1473.7 motion to vacate has not yet begun. (§ 1473.7, subd. (b)(2).) Consequently, we conclude the Attorney General's request we dismiss the appeal lacks merit.

B. *Ramirez Failed to Show Prejudice From the Purportedly Ineffective Assistance*

Ramirez's challenge to the order denying his motion to vacate his conviction argues he proved he received constitutionally deficient representation in three respects: Dorney failed to advise him the guilty plea would lead to mandatory

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[1] This procedural objection differs from the one the prosecution made at the hearing in the trial court. There, the prosecution argued that in light of Ramirez's 2001 deportation, the motion to vacate was untimely and Ramirez was "ineligible" for relief under section 1473.7.

deportation, neglected to investigate possible defenses, and failed to attempt to negotiate an immigration-neutral plea.

Ramirez argues he proved these omissions with the two declarations he submitted in support of the motion, and he cites a United States Supreme Court case as authority for concluding those purported omissions constituted ineffective assistance. Ramirez argues Dorney's performance was constitutionally deficient under *Padilla, supra,* 559 U.S. 356, in which the high court held defense attorneys have an affirmative obligation to provide competent advice to noncitizen criminal defendants regarding the potential immigration consequences of guilty pleas. (*Padilla, supra,* 559 U.S. at p. 369.)[2]

The respondent's brief mounts a three-pronged attack on Ramirez's contention his conviction should be vacated on grounds he received ineffective assistance of counsel. First, the Attorney General argues that, even assuming the truth of Ramirez's assertion Dorney did not warn him of the immigration dangers of pleading guilty, that omission cannot constitute ineffective assistance because in 1988, when he entered his plea, criminal defense attorneys had no duty to advise clients about the immigration consequences of a plea. (See *Strickland, supra*, 466 U.S. at p. 688 [counsel's performance judged by "prevailing professional norms"].) In support, the Attorney General cites *Chaidez v. United States* (2013) 568 U.S. 342 (*Chaidez*), in which the Supreme Court clarified that *Padilla, supra,* 559 U.S. 356 did not apply retroactively to judgments of conviction which were final before *Padilla* was decided. (*Chaidez, supra,* 568 U.S. at p. 344.)

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[2] Ramirez also cited one additional case, *People v. Patterson* (2017) 2 Cal.5th 885, which held the trial court's standard advisement under section 1016.5 that a conviction "'may'" have adverse immigration consequences does not substitute for the required advisement by *counsel,* and does not bar a motion to withdraw a guilty plea. (*Id.,* at p. 898.) This citation does not help Ramirez because no argument on appeal concerns the effect of the trial court's section 1016.5 advisement.

Second, the Attorney General argues the evidence supports the finding Dorney did advise Ramirez of the immigration consequences of pleading guilty, citing Ramirez's sworn statement on the *Tahl* form acknowledging his attorney specifically advised him of those consequences and Dorney's sworn statement on the plea form to the same effect.

Finally, the Attorney General argues even if Ramirez had received constitutionally deficient advice regarding the immigration consequences of his plea, his appeal fails because he did not satisfy the "prejudice" prong of the *Strickland* test. In other words, Ramirez did not prove it was reasonably probable he would have rejected the plea and "insisted, instead, on proceeding to trial" but for Dorney's incompetence. (*Resendiz, supra*, 25 Cal.4th at p. 253.) The simple force of this last argument compels us to affirm the order denying the motion to vacate the conviction. For that reason, we need not discuss the Attorney General's other two arguments in support of the order.

In *Lee v. United States* (2017) 137 S.Ct. 1958 (*Lee*), the United States Supreme Court set a high evidentiary standard for setting aside a guilty plea based on ineffective assistance of counsel. The Court stated: "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee, supra*, 137 S.Ct. at p. 1967; see also *Resendiz, supra*, 25 Cal.4th at p. 253 ["petitioner's assertion he would not have pled guilty if given competent advice 'must be corroborated independently by objective evidence'"].)

The facts of *Lee, supra*, 137 S.Ct. 1958 illustrate the sort of "contemporaneous evidence" needed to "substantiate" a defendant's contention he would have rejected a plea deal "had he known that it would lead to mandatory deportation." (*Id.*, at p. 1967.) The Korean-born Lee had been a lawful permanent resident of the United States for 30 years when he was arrested on a felony drug charge. He agreed to

plead guilty in exchange for a light sentence only after his counsel erroneously advised him the conviction would *not* lead to deportation. After discovering counsel's mistake, Lee moved to vacate his conviction based on ineffective assistance in connection with his guilty plea.

The Supreme Court held Lee satisfied his burden of proving he would not have pleaded guilty absent counsel's erroneous advice, noting: "At an evidentiary hearing on Lee's motion, both Lee and his plea-stage counsel testified that 'deportation was the determinative issue in Lee's decision whether to accept the plea.' [Citation.]" (*Lee*, *supra*, 137 S.Ct. at p. 1963.) "Lee asked his attorney repeatedly whether there was any risk of deportation from the proceedings, and both Lee and his attorney testified at the evidentiary hearing below that Lee would have gone to trial if he had known about the deportation consequences." (*Id*., at pp. 1967-1968.)

Moreover, Lee produced evidence of other facts substantiating his assertion that avoiding deportation was his primary concern during the plea process: "At the time of his plea, Lee had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents—both naturalized American citizens. In contrast to these strong connections to the United States, there is no indication that he had any ties to South Korea; he had never returned there since leaving as a child." (*Lee*, *supra*, 137 S.Ct. at p. 1968.) The Supreme Court concluded, "Lee's claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontroverted evidence." (*Id.*, at p. 1969.)

Ramirez confidently asserts the facts of *Lee*, *supra*, 137 S.Ct. 1958 are "similar to those at bar," and "an evaluation of all the circumstances in this case" demonstrates Ramirez, like Lee, met his burden of proving "that absent counsel's deficiencies he would have rejected counsel's advice and not have pleaded guilty to all charges[.]"

Ramirez's argument is far off the mark. Unlike the defendant in *Lee, supra,* 137 S.Ct. 1958, Ramirez did not support his motion to vacate his conviction with any "contemporaneous evidence" of his mindset *during* plea negotiations to support his contention he would have rejected the plea deal had he known it would result in deportation.

For example, Ramirez did not state in his declaration that he told Dorney either of his immigration status or that he was concerned about the immigration consequences of pleading guilty. Nor did Ramirez explain in his declaration his life circumstances in 1988 when, at age 18, he agreed to plead guilty in exchange for what the trial court aptly described as "a very light sentence." Unlike the defendant in *Lee,* Ramirez did not cite any family obligations, job, or other "strong connections to the United States" (*Lee, supra,* 137 S.Ct. at p. 1968) which existed in 1988 and would have corroborated his contention that he, as an 18-year-old immigrant with only five years residency here, would have chosen to go to trial and risk a nine-year prison term rather than plead guilty in exchange for 90 days in jail, especially since deportation would follow the completion of either sentence.

Substantial evidence supports the trial court's finding that in 1988, the then-young Ramirez was concerned primarily with avoiding a long prison term rather than avoiding deportation. As the trial court observed, Ramirez "did not marry his wife until 2006, and did not have his children until after that." Clearly, his present concern for his family is irrelevant to his motivation in 1988.

We conclude Ramirez did not carry his burden of proving prejudice under the *Strickland* test: He did not prove it was reasonably probable he would have rejected the plea and "insisted, instead, on proceeding to trial" had Dorney properly advised him of the immigration consequences of the guilty plea. (*Resendiz, supra,* 25 Cal.4th at p. 253.)

Nor did Ramirez demonstrate prejudice from Dorney's other purported errors. Ramirez offered no evidence the prosecution likely would have been open to Dorney's attempts to negotiate an alternative, immigration-safe plea. Given the strong evidence against Ramirez — undercover officers observed his four drug sales to other undercover officers — there is no reasonable probability Ramirez could have obtained a plea bargain involving conviction for something other than a drug offense.

The same result applies to Ramirez's claim he suffered prejudice from Dorney's purported failure to investigate possible defenses. Ramirez does not suggest what those potential defenses could have been.

Because Ramirez failed to satisfy the prejudice prong of the *Strickland* test, the trial court properly denied Ramirez's motion to vacate the conviction based on ineffective assistance of counsel.

III

DISPOSITION

The order denying the motion to vacate judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.